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No. 1063

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IN THE

SUPREME COURT OF THE UNITED STATES

ALLEN E. NORTHERN, JR.,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

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IN THE SUPREME COURT OF THE UNITED STATES

No.

ALLEN E. NORTHERN, JR.,

Petitioner

VS.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

To the Honorable, the Chief Justice, and the Associate Justices of The Supreme Court of the United States:

The petitioner, Allen E. Northern, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in Cause No. 15,469 of that Court on March 27, 1964.

OPINION BELOW

The opinion of the Court of Appeals for the Sixth Circuit has not been generally reported, but a copy thereof is appended to this petition.

STATEMENT OF JURISDICTION

The United States District Court for the Middle District of Tennessee, Nashville Division, entered a judgment of conviction on February 15, 1963, against the petitioner on a charge of willful evasion of pay-

ment of income taxes for the year 1956. The United States Court of Appeals affirmed on March 27, 1964.

Jurisdiction to entertain this petition is conferred on the Supreme Court of the United States by 28 U.S.C. §1254(1).

QUESTION PRESENTED

In a prosecution for fraudulent underpayment of Federal income taxes for three consecutive years, is evidence admissible that the taxpayer concealed income in a subsequent year by personally falsifying records, on the ground that this tends to show that he authorized prior similar conduct by his employee during the prosecution period?

STATUTE INVOLVED

26 U.S.C. §7201. Attempt to evade or defeat tax.

> Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution. (Aug. 16, 1954, 9:45 a.m., E.D.T., c 736, 68A Stat. 851.)

STATEMENT OF THE CASE

Petitioner (hereinafter called "defendant") is in the amusement machine business, maintaining coin-operated music and pinball machines in various locations in the Nashville area. He was convicted in the District Court of the Middle District of Tennessee

on one of three counts charging willful evasion of payment of income taxes. (26 U.S.C. §7201) Defendant was indicted in separate counts for the years 1954, 1955 and 1956 (5a).[1] The first trial resulted in a mistrial when the jury could not agree. At the second trial, defendant was acquitted by the jury for the years 1954 and 1955 but convicted for the year 1956 (465a).

The indictments charge specifically that defendant filed on behalf of himself and his wife false and fradulent income tax returns for each year in violation of section 7201 of the Internal Revenue Code, alleging particular amounts of actual and stated income and taxes for each year (5a-7a). The Government's proof was based upon the net worth method of establishing tax evasion. The beginning point for the Government's computation was January 1, 1954, from which the Government showed additions to net worth during the years 1954, 1955 and 1956, and thereby attempted for each year to prove substantial unreported income (463a-464a).

One of the questions presented to this Court of Appeals, and the sole question presented by this petition relates to a ruling by the District Court admitting in evidence certain testimony concerning the defendant's activities in 1957. This ruling was made in the following context. Robert Green, an employee who made collections for the defendant, testified that beginning late in 1955 and up until May of 1956 he falsified collection tickets for machines at Estes' Drive-In, by showing them to be only one-half the amount actually collected (485a). Green did not testify that

[1] References to the record in the Appendix to the Brief for Defendant-Appellant in the Court of Appeals will be designated by a page number followed by "a".

this was done at the direction of defendant or with his consent. However, Mr. Estes testified that he had an "agreement" with defendant under which this was done (469a). On cross-examination Estes could give neither the time nor place when such agreement was made, nor could he furnish any details (470a, 471a, 476a). On redirect examination, over defendant's strenuous objection, Estes was allowed to testify that after Mr. Northern's machines had been removed from his place in May of 1956 and relocated there in 1957, Mr. Northern personally made collections and falsified the records showing lesser collection amounts by putting, "any amount he wanted to" on the collection tickets, not necessarily one-half as Green had always done (480a, 482a). The Court overruled defendant's objection and admitted the testimony, with the instruction that the jury could consider it as tending to show "the truth of the statements previously made as to the agreements that were in existence in the years 1954, 1955, or 1956" (482a).

ARGUMENT AND REASONS FOR GRANTING THE WRIT

In a prosecution for fraudulent underpayment of Federal income taxes for three consecutive years, is evidence admissible that the taxpayer concealed income in a subsequent year by personally falsifying records, on the ground that this tends to show that he authorized prior similar conduct by his employee during the prosecution period?

The Court of Appeals answered this question in the affirmative. Defendant contends that it should have been answered in the negative.

By its ruling and instruction, the District Court

permitted the jury to treat testimony concerning defendant's wrongful conduct in 1957 as evidence that he had participated in similar wrongful conduct through his agent Green, in 1956. The Court's instruction purports to limit the effect of this testimony, but it does not in fact do so. The jury was instructed that the testimony could be considered "only" insofar as it tended to show the truth of earlier testimony concerning the income-concealing agreements allegedly made by the defendant in 1956. Thus, from testimony that defendant concealed income in 1957, the jury was permitted to directly infer that he participated in the concealment of income in 1956.

It is fundamental that a defendant may not be convicted of one offense upon the basis of evidence that he committed other similar offenses upon other occasions. *Bird v. United States*, 180 U. S. 356, 1900; *Boyd v. United States*, 142 U. S. 450, 1891; *Witters v. United States*, 106 F.2d 837 (D.C. Cir., 1939); *Boyer v. United States*, 132 F.2d 12 (D.C. Cir., 1942); *Hibby v. United States*, 150 F.2d 165 (5 Cir., 1945); and *Lovely v. United States*, 169 F.2d 386 (4 Cir. 1948). This principle is not a mere technical rule of evidence, but is one of the most basic protections afforded criminal defendants. It has been described by the Fourth Circuit Court of Appeals in the following terms:

> " 'The general rule of evidence applicable to criminal trials is that the state cannot prove against a defendant any crime not alleged in the indictment, either as a foundation for a separate punishment, or as aiding the proofs that he is guilty of the crime charged.' 1 Bishop, New Crim. Proc. §1120. This rule, so universally recognized and so firmly established in all English-speaking lands is rooted in that jealous regard for the liberty of the individual which has distinguished our juris-

> prudence from all others, at least from the birth of Magna Charta. It is the product of that same humane and enlightened public spirit which, speaking through our common law, has decreed that every person charged with the commission of a crime shall be protected by the presumption of innocence until he has been proved guilty beyond a reasonable doubt. This rule, and the reasons upon which it rests, are so familiar to every student of our law that they need be referred to for no other purpose than to point out the exceptions thereto."

Lovely v. United States, 169 F.2d 386, 389 (4 Cir., 1948).

In the present case, the Court of Appeals justified the admission of the testimony concerning Northern's 1957 activities on the ground that it "tended to prove knowledge and authorization by Northern of the concealments which took place in the tax years in question". Clearly the testimony was not admissible for the sole purpose of proving "authorization" of the concealments, since evidence of "authorization" would be evidence of participation in the crime charged—i.e., tax evasion through fraudulent concealment of income. Nor is the testimony admissible for the purpose of proving "knowledge". Where knowledge is an element of the offense charged, the commission of prior offenses by the defendant may be admissible for the limited purpose of proving such knowledge. *Grant v. United States*, 255 F.2d 341 (6 Cir., 1958). This exception does not, however, apply to the present case, since the fact at issue was not Northern's knowledge of the prior transactions, as a constituent element of the offense charged, but his participation in these transactions.

Moreover, knowledge at a prior time cannot prop-

erly be proved by evidence of subsequent conduct. *Waller v. United States*, 177 F.2d 171 (9th Cir. 1949); *Hubby v. United States*, supra; and *Witters v. United States*, supra. See also *Roe v. United States*, 316 F.2d 617, 621 (5th Cir. 1963). Wigmore explains the reason for this rule, and the reason for distinguishing between knowledge and intent in this regard, as follows:

> "[T]he subsequent uttering [of a fraudulent instrument] could of course result in no warning which should show Knowledge at the anterior time charged; while, in evidencing Intent, it is the repetition of instances that tends to negative innocence in particular instances, and thus it is immaterial whether the instances are found occurring before or after the act charged."
>
> II Wigmore, Evidence §316.

This distinction has been recognized and followed by at least two of the Circuit Courts:

> "Where other acts are offered as evidentiary of intent under the rule heretofore mentioned, it matters not whether they are subsequent or prior in time. Regina v. May, 1845, 1 Cox Cr. 236; Shreve v. United States, 9 Cir. 1939, 103 F.2d 796. Proof of knowledge, on the other hand, materially differs, requiring inherently that the other acts be prior in time."
>
> *Waller v. United States*, 177 F.2d 171, 176 (9th Cir. 1949)

> "[W]hile one may have an intention to do something in the future, one cannot have knowledge of a fact at a certain time through some happening or occurrence that may take place in the future. . . . The opinion of the court is that upon the question of knowledge the cases, properly interpreted, make evidence of other offenses admissible only when it relates to prior offenses or to situations in which the offenses occurred both

> prior and subsequent to the offense charged in the indictment, and that consequently, the admission of the evidence of subsequent offenses for the purpose of showing knowledge was fatally prejudicial and necessitates a reversal of the judgment."
>
> *Witters v. United States*, 106 F.2d 837, 840 (D.C. Cir., 1939)

Counsel has been unable to find any case, other than the present case, which holds that subsequent conduct is admissible for the purpose of proving prior knowledge.

Finally, the admission of this testimony cannot be justified on the theory that it tended to show the defendant's "knowledge," since the court did not so limit it in its instruction to the jury. The jury was instructed that they could treat the testimony as evidence, not of defendant's knowledge of the prior agreements, but of his participation in them. This was clearly improper. If there was a logical, proper purpose for admitting this testimony, the defendant was entitled to instructions limiting it to that purpose. *Hubby v. United States*, 150 F.2d 165 (5th Cir. 1945).

On the basis of the above authorities, petitioner respectfully submits that certiorari should be granted in this case, for the following reasons:

(1) The error asserted by petitioner affected his basic procedural rights. It is not improbable that the defendant was convicted of the offense with which he was charged solely because of testimony concerning an entirely separate offense, which was not charged in the indictment. It is submitted that the admission of such testimony was a deviation from established procedural principles of sufficient magnitude to merit the attention of this Honorable Court.

(2) This case focuses a problem which is recurrent in tax fraud litigation and which urgently needs emphasis and clarification. Because taxpayers engage in substantially similar conduct from year to year in recording and reporting their income, and because of the importance of the mental element in tax fraud prosecutions, the admissibility of evidence of "other offenses" is a frequent issue in such cases. The Circuit Courts have not, in general, given this issue the attention it deserves. The opinion of the Sixth Circuit Court of Appeals in the present case is typical in this regard. In disposing of the "other offense" issue, the Court merely stated that the testimony concerning the 1957 concealment was admissible for the purpose of proving "knowledge and authorization." The Court fails to note that knowledge, as a constituent element of the offense charged, is not at issue. It also fails to note that the District Court's instruction did not limit the testimony to the issue of knowledge. Moreover, the two cases cited by the Court in support of its holding both involved testimony concerning prior, rather than subsequent conduct, and in both cases the testimony was relevant to a mental element of the offense charged.

This Honorable Court has previously taken a strong position against the admission of evidence of other conduct or offenses in cases involving crimes of physical violence. *Bird v. United States*, supra and *Boyd v. United States*, supra. It is submitted that the principles of these leading cases should be reaffirmed within the context of tax fraud litigation, in which the problem is far more recurrent, and the danger of abuse, through loose reliance upon the "intent, knowledge, or design" exceptions, is far greater.

CONCLUSION

The petitioner believes that on the basis of the above stated reasons, he should be granted a review of his conviction on writ of certiorari, and the said conviction should be reversed and the petitioner discharged, or in the alternative, granted a new trial.

Respectfully submitted,

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SUPREME COURT, U. S.

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APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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McQuiddy Printing Co., Nashville, Tenn.

No. 15469

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. ALLEN E. NORTHERN, JR., *Defendant-Appellant.*	APPEAL from the United States District Court for the Middle District of Tennessee.

Decided March 27, 1964

Before: WHICK, Chief Judge, EDWARDS, Circuit Judge, and PECK, District Judge.

PER CURIAM. Appellant Northern was tried and convicted by a jury in the District Court on Count 3 of an indictment charging him with wilfully attempting to evade a large portion of his income tax due for the year 1956 in violation of Section 7201 of the Internal Revenue Code of 1954. (26 U. S. C. § 7201) He was acquitted on Counts 1 and 2 which charged evasion of his income taxes for the years 1954 and 1955. He was sentenced to imprisonment for one year and fined $2,000. His first trial had resulted in a disagreement and mistrial. The conviction occurred in his second trial.

Northern was engaged in the amusement machine business, maintaining coin-operated music and pinball machines in restaurants and other places in the area of Nashville, Tennessee.

The Government's proof was by the net worth and expenditures method which showed increases in net worth of $12,058.45 for 1954, $24,422.06 for 1955 and $21,896.61 for 1956. Under this method the taxable unreported income amounted to $11,289.29 in 1954, $24,684.66 in 1955 and $20,855.12 in 1956.

The Government offered evidence tending to prove that during the tax years in question, Northern did not report in his income tax returns collections from machines at a number of locations; that in 1956, pursuant to an agreement made by Northern with a location owner named Estes, collection tickets on machines at Estes' place of business were falsified by Northern's employee Green to show only one half of the actual moneys collected from the machines, the undisclosed one half being divided between Northern and Estes and not included in the income tax returns of either of them.

Late in 1956 Estes discontinued the use of Northern's machines and they were removed from the location. Green left Northern's employ.

The Government offered proof that in 1957, which was subsequent to the indictment years, Northern's machines were reestablished in Estes' place of business. Northern personally made the collections from these machines writing on the collection tickets only one half of the moneys collected and dividing the other half with Estes. This was done without any discussion of the subject by Northern with Estes.

Northern strenuously objected to the introduction of this 1957 evidence and it was admitted solely as reflecting upon Northern's knowledge of the prior practice in the indictment years. The voluntary resumption by Northern in 1957 of the practice during the indictment years without any new agreement or understanding with the location owner tended to prove knowledge and authorization by Northern of the concealments which took place in the tax years in question. We think this testimony was admissible. *Grant* v. *United States*, 255 F.2d 341 (CA 6), cert. denied 358

U. S. 828; *Gordon v. United States*, 164 F.2d 855 (CA 6), cert. denied 333 U. S. 862.

It was further contended that the Government, in its opening net worth statement, should have allowed a larger figure for cash on hand and for the value of the machines in inventory. Cash in the amount of $15,000 was allowed in the statement which was the largest amount of cash which Northern, prior to the trial, claimed he had on hand. This conformed to testimony which Northern had given at a formal hearing before the trial. Northern argued that he also had on hand about $1,700 additional in cash as an operating fund for which he was given no allowance and that he signed a statement in 1959 that he carried as much as $3,000 in cash. He was allowed $1,500 as an operating fund in the net worth statement for the opening of 1954 and this was carried in the statement for the years 1955 and 1956. The jury could have found from the evidence that these claimed amounts of additional cash were included in the item of $15,000 at the beginning of 1953 which was allowed to Northern in the net worth statement.

Relative to the machines on hand, the Government obtained the figure of $9,804.80 which it used in the opening net worth statement from Northern's own 1953 income tax return. This admission was corroborated by his 1951, 1952, 1954 and 1955 income tax returns, some of which were prior to the commission of the offenses charged, and by an audit of his 1954 and 1955 tax returns which was made in 1956. This audit had been accepted as correct by Northern. Comparing the pre-indictment with the indictment years, the allowance for the machines does not appear to us to be an unreasonable estimate.

The value of the machines on hand was important only for depreciation purposes. In checking the new purchases over a three year period from 1950 to 1953 only a gain of one machine was revealed.

In any event, even if additional amounts for cash and for the value of the machines were allowed in the net worth statement as claimed by Northern, they would not materially affect the large shortage in reported income in his return for the year 1956.

We find no merit in the claim that Northern's records were illegally obtained by the Government. The District Judge in determining the motion to suppress evidence found that Northern had voluntarily surrendered his records to the Internal Revenue agent for examination. In our judgment, there was substantial evidence to support this finding. We find no inconsistency in the verdicts of the jury.

The judgment of conviction is affirmed.

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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 1063

ALLEN E. NORTHERN, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-4) is reported at 329 F. 2d 794.

JURISDICTION

The judgment of the court of appeals was entered on March 27, 1964. (Pet. App. 1.) Mr. Justice Stewart granted an extension for filing the petition for a writ of certiorari until May 7, 1964, and it was filed on May 4, 1964. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 (1).

QUESTION PRESENTED

Whether, after the introduction of evidence that petitioner arranged to have records of his income falsified during the years covered by the indictment, the district court erred in admitting evidence that the arrangement was continued in subsequent years.

STATEMENT

Petitioner was indicted in three counts for willful attempted evasion of income taxes by filing fraudulent joint tax returns on behalf of himself and his wife for the calendar years 1954, 1955, and 1956, in violation of Section 7201 of the Internal Revenue Code of 1954. (R. 5a-7a.)[1] After a trial by jury he was acquitted on the first two counts but was found guilty on the third count (R. 465a), and sentenced to imprisonment for one year and fined $2,000. (R. 7a-8a). The third count alleged that petitioner had reported taxable income of $5,227.12 and a tax of $1,195.97, whereas the correct taxable income was $28,295.97 and the correct tax was $8,785.11. (R. 6a-7a.) The government's proof was by the net worth method (see R. 463a-464a), and the sufficiency of the evidence is not in dispute.

Petitioner owned coin-operated amusement machines at various restaurants and taverns. (R. 311a-312a, 330a.) Sometimes petitioner collected the money, but usually this was done by one of his em-

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[1] "R." refers to the Appendix and Supplemental Appendix filed by petitioner in the court of appeals. "Supp. R." refers to the Appendix for the government in the court of appeals.

ployees.* (R. 316a.) After certain expenses were defrayed, the balance of the moneys collected was divided equally between petitioner and the proprietor of the establishment, and a ticket was made out showing the amount thus divided. (R. 316a, 318a, 320a, 484a.) The government's evidence showed that receipts from numerous locations were not entered at all in petitioner's ledger during 1955 and 1956, and that in various other instances the ledger recorded smaller amounts than those actually received. (Supp. R. 64b-70b.)

Estes, the proprietor of one establishment, testified on direct examination that petitioner's employee, Green, who did the collecting from 1954 until he left petitioner in May 1956, recorded on the tickets only one-half of the true amount collected for the last seven or eight months of his employment. (R. 467a-469a, 485a.) Estes said that this was done by agreement between himself and petitioner. (R. 469a.) Estes discontinued the use of petitioner's machines at the time Green quit. (R. 342a, 485a.) On cross-examination petitioner's counsel, in an effort to show that petitioner knew nothing about this system of falsifying tickets, elicited answers in which Estes admitted that he could not remember exactly when or where the agreement with petitioner was made. (R. 470a-476a.)

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* Estes testified, however, that on occasion he himself took the money to petitioner and gave petitioner twice the amount of money shown on the ticket. (R. 472a.) Green also testified that he wrote the tickets concerning the Estes location in the manner Estes had described. (R. 483a-485a.)

Before commencing his redirect examination of Estes, the prosecutor offered to prove that Estes resumed the use of petitioner's machines in 1957 (the year immediately following the indictment years), that petitioner himself made the collections thereafter, that petitioner wrote out the tickets and understated the true amounts in substantially the same manner as Green had previously done, and that he did all this without any new conversation or agreement with Estes on the subject of falsifying tickets. (R. 476a-478a.) The prosecutor explained that petitioner's resumption of this peculiar practice, without a word between him and Estes on the subject, would tend to show that petitioner must have agreed to the method previously employed by Green. The court ruled that the evidence could be introduced for that limited purpose. (R. 478a-479a.) Accordingly, the jury returned to the court room and Estes testified as described above. (R. 479a-482a.) The court then immediately instructed the jury as follows (R. 482a):

> Ladies and Gentlemen of the Jury, during your absence we went into the question of the testimony that has just been heard by you here. The defendant objected to it as not pertaining to the case because it was after 1956. I overruled the objection and permitted these questions and answers to be placed in the record. However, you are instructed that the statements made by the witness with reference to what occurred in 1957, or subsequent years, can be considered by you only for such value as it may have, if any, in establishing the truth of the statements made

as to the agreements that were in existence in the years 1954, 1955 or 1956.

ARGUMENT

The testimony concerning petitioner's falsification of tickets in 1957 was relevant to the question whether petitioner and Estes had an agreement to falsify records during 1954, 1955 or 1956. The jury could infer that petitioner would not have resumed Green's practice of recording on the tickets only one-half of the money collected, without any discussion with Estes, unless the two of them had already had a prior agreement to that effect while Green was doing the collecting. In *Johnson* v. *United States*, 318 U.S. 189, 195-196, this Court held that it would be proper to show the taxpayer's receipt of payoffs from gamblers during 1938, a year not covered by the indictment, in order to establish that he had not, as he claimed, ceased such collections during the latter part of 1937. Evidence of subsequent conduct is, therefore, admissible in criminal income tax cases when relevant to the matter at issue. See also *Bateman* v. *United States*, 212 F. 2d 61, 66 (C.A. 9th); *United States* v. *Stoehr*, 196 F. 2d 276, 282-283 (C.A. 3d), certiorari denied, 344 U. S. 826.

Petitioner further argues (Pet. 5-6) that the evidence was inadmissible in that it established the commission of a separate offense not charged in the indictment. That contention has been answered in numerous cases. Relevant evidence does not become inadmissible simply because it may also prove the

commission of another offense. *Johnson* v. *United States*, *supra*, 318 U.S. at 195-196; *Cravens* v. *United States*, 62 F. 2d 261, 273 (C.A. 8th); *Lovely* v. *United States*, 169 F. 2d 386, 388 (C.A. 4th).

Finally, cases which hold (Pet. 6-8) that prior knowledge cannot be inferred from subsequent conduct are not in point here. As the petition itself concedes (p. 6), the issue here was not whether petitioner had knowledge in 1956 that he was acting illegally, but whether he and Estes actually did enter into an agreement in 1956 to falsify records. To that issue, his 1957 conduct was plainly relevant.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted.

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June, 1961.